Supreme Court, U.S.
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No. 94-236

In The

Supreme Court of the United States

October Term, 1994

In re Petition of
JOHN and JANE DOE, Husband and Wife,
to Adopt BABY BOY JANIKOVA,
a minor, by his guardian ad litem,
Edward J. O'Connell,

Petitioners,

OTAKAR KIRCHNER,
Father of Baby Boy Janikova,

Respondent.

Petition For Writ Of Certiorari
To The Illinois Supreme Court

BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI

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QUESTION PRESENTED

Petitioners, John and Jane Doe and Baby Boy Janikova (also known as "Richard"), have asked this Court to consider whether they have been unconstitutionally deprived of a hearing to determine whether Richard should be permitted to live with his father, Respondent Otakar Kirchner, following a decision of the Illinois Supreme Court reversing the trial court's finding of unfitness against Mr. Kirchner and vacating the Does' *adoption* of the child. However, the Illinois Supreme Court did not address the question of whether, in the wake of its decision, the Does might be entitled to a hearing to determine whether they have a cognizable claim to continue their status as Richard's *custodians*. In fact, neither the record nor the decision of the court below presents either of the questions framed by the Petitioners. The only question presented by this case is:

> Whether the decision of the Illinois Supreme Court, which concluded pursuant to state law that the evidence presented to the trial court did not support its finding that Mr. Kirchner was unfit and that the order of adoption dependent on this finding of unfitness must therefore be vacated, raises federal issues regarding whether or not Petitioners have a constitutional right to continue their custodial relationship, when no issue of custody was presented to or resolved by the courts below?

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JURISDICTIONAL STATEMENT

In their Jurisdictional Statement, Petitioners cite no authority supporting their claim of jurisdiction. In fact, as discussed more fully below, this Court lacks jurisdiction to hear this case in that neither the decision of the Illinois Supreme Court nor the record below presents either of the questions framed by Petitioners, or any other federal question, as required by 28 U.S.C.A. § 1257.

STATEMENT OF THE CASE

This case stems from proceedings initiated by Mr. and Mrs. Doe, seeking to terminate the parental rights of Mr. Otakar Kirchner and to allow the Does to adopt his son (named by the Does as "Richard") against Mr. Kirchner's will. Petitioners' Statement of the Case and their description of applicable law is inaccurate, incomplete, and misleading in a number of critical respects. Most importantly, Petitioners fail to reflect in their Statement the conclusion reached by all seven Justices of the Illinois Supreme Court, as well as the dissenting Justice of the Illinois Appellate Court, that the Does and their initial counsel hold responsibility for placing Richard in his current untenable situation by misrepresenting to the trial court that the boy's father was "unknown," and by pursuing an adoption when it was clear that the child had a fit father who was interested in his son and unwilling to surrender his parental rights. App. 3 (sup. maj.), App. 15

(sup. conc.), App. 45-46 (app. dissent).[1] Pursuant to Supreme Court Rule 15.1, Respondent notes as follows:

1. When Richard was born on March 16, 1991, Mr. Kirchner was unaware of his son's birth. His repeated efforts on this day and the days that followed to obtain information about his son from the hospital where he and Ms. Janikova had planned to give birth were unsuccessful because Ms. Janikova had delivered the child at a different hospital to avoid Mr. Kirchner. App. 20-21 (app. maj.); App. 66 (Heiple rehearing).

2. Four days after Richard's birth on March 16, 1991, Ms. Janikova placed the child with the Does and consented to his adoption without informing Mr. Kirchner. App. 21 (app. maj.).

3. In the two months that followed Richard's birth, Mr. Kirchner actively sought to learn about the status of his son, while both his son's whereabouts and the proceedings to adopt Richard were concealed from him. App. 21-22 (app. maj.); App. 44-45 (app. dissent). Though Richard's mother informed Mr. Kirchner through her uncle that their son was dead (App. 21 (app. maj.)), Mr.

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[1] Citations to the opinions below are in the form "App. [page no.]," referring to the decisions appended to the Petition for Certiorari as numbered therein. The following forms will be used to refer to the various opinions below: "sup. maj." and "sup. conc." for the majority and concurring opinions of the Illinois Supreme Court, "app. maj." and "app. dissent" for the majority and dissenting opinions of the Illinois Appellate Court, and "Heiple rehearing" for the opinion of Justice Heiple in support of his vote to deny rehearing.

Kirchner continued to search for information about his son's status.

4. During this same time, Ms. Janikova told the Does and their lawyer that she knew the identity and whereabouts of the boy's father, but that she did not wish to disclose this information because she knew he would never consent to adoption (App. 46 (app. dissent)), and because "she feared that he would assert his parental rights." App. 20 (app. maj.). Petitioners claim in contrast that Ms. Janikova "informed the adoptive parents that she did not feel safe because the biological father had obtained the telephone number of the abused women's shelter where she was living." Petition, p. 5. The correct understanding of Ms. Janikova's explanation of why she would not disclose the identity and whereabouts of Mr. Kirchner is significant because it reflects the fact that the Does and their lawyer, as well as Ms. Janikova, all knew from the outset that Mr. Kirchner would contest the adoption of his son, and that the successful fictitious portrayal of Mr. Kirchner as a disinterested and unfit parent would be dependent on their ability to conceal from him both the existence and whereabouts of his son and the pending adoption proceedings. Thus, neither the Does nor their lawyer made any significant effort to identify or locate Mr. Kirchner. App. 2 (sup. maj.), App. 15 (sup. conc.).

5. Fully aware that the identity and whereabouts of Richard's father were known to Ms. Janikova, the Does and their lawyer nevertheless each filed affidavits falsely representing to the trial court that Richard's father was unknown, thereby precluding Mr. Kirchner from learning of the planned adoption of his son in a timely fashion. App. 46 (app. dissent).

6. In May of 1991, less than two months after the boy's birth, Ms. Janikova first told Mr. Kirchner of Richard's placement for adoption. Mr. Kirchner promptly contacted a lawyer and opposed the adoption petition, putting the Does on formal notice of his interest in his son. Rather than return Richard to his father, the Does sought to prove Mr. Kirchner unfit based on his alleged failure to show an interest in his son during the first thirty days of the boy's life. A full year later, the trial judge permitted Richard to remain with the Does by entering a finding that Mr. Kirchner had proven a lack of interest in his son during the first 30 days of his life and was therefore unfit to be a parent. App. 23-24 (app. maj.). This finding was based on the trial court's view that Mr. Kirchner should have contacted an attorney even before learning that his son had been put up for adoption. No dispute about his credibility was raised in the trial court, which credited his testimony regarding his efforts to learn about his son but found his efforts were not valid measures of his interest. App. 23-24 (app. maj.).

7. The Illinois Appellate Court, over a sharp dissent, affirmed the trial court's finding of unfitness. App. 31-37 (app. maj.). That court also reached the unprecedented conclusion that the passage of time warranted termination of parental rights even in the absence of a proper finding of unfitness. App. 24-31 (app. maj.).

8. The Illinois Supreme Court, after giving due deference to the trial court's findings of fact, unanimously concluded that no grounds exist under the Illinois Adoption Act for finding Mr. Kirchner unfit. App. 2-3 (sup. maj.), App. 13-15 (sup. conc.). The Court also rejected the

conclusion of the appellate court that termination of parental rights may stand solely on a finding that it is in the child's "best interests." App. 3-4 (sup. maj.), App. 5-13 (sup. conc.). It therefore reversed the orders terminating Mr. Kirchner's parental rights and allowing Richard's adoption by the Does. The court did not address issues relating to the child's custody, which were not properly before it. *See* App. 12 (sup. conc.). In an opinion in support of his vote to deny rehearing, writing only for himself, Justice Heiple reflected his expectation that custody of Richard would be transferred to Mr. Kirchner (App. 68); however, nothing in the opinion of the court as a whole suggests that the court intended to resolve issues of custody that have never been properly raised.

9. Contrary to Petitioners' description of the case, the Illinois Supreme Court did not address the question of whether the Does, upon the filing of a proper petition, might retain legal custody of Richard. Rather, the only issues treated by that court were those issues raised by the Does' petition to adopt.

For a more detailed statement of the facts giving rise to this Petition, Mr. Kirchner relies upon the opinions below, and in particular upon both the majority and dissenting opinions of the Illinois Appellate Court, attached to the Petition as Appendix C.

REASONS FOR DENYING THE WRIT

This case presents no federal question proper for review. Confusing issues of state law and policy with federal questions, Petitioners ask this Court to review a

decision made pursuant to a narrow provision of state law defining unfitness, which was interpreted and applied by the Illinois Supreme Court in a manner consistent with the scheme of the governing Illinois Adoption Act. They base their claims on the newfound assertion, without foundation in law, that they have a federally-protected right to continue a custodial relationship established during the course of litigation over Richard's adoption. Yet the courts below never addressed the issues of custody upon which Petitioners' claims now rest. Moreover, Petitioners make no claim that the decision from which review is sought, affirming well-established processes for determining when children of non-consenting parents can be freed for adoption, raises any substantive conflict with decisions of this Court or other courts. *See* Supreme Court Rule 10.1(b), (c).

The Petition should be denied for two basic reasons. First, the decision below raises no federal issues which this Court has jurisdiction to review, because it was based solely on the Illinois Supreme Court's interpretation of the state statutory definition of unfitness, and the question of whether Petitioners have been unconstitutionally deprived of a hearing to vindicate a claimed right to some undefined custodial status is simply not presented either by the record or the decision below. Second, the decision below was fully consistent with decisions of other state and federal courts, including this Court, defining the constitutional boundaries of familial liberty interests. This case therefore presents no issue worthy of certiorari.

I. This Court Lacks Jurisdiction to Review this Case, Because Neither the Decision Below, Which Addressed Only a Question of State Law Regarding the Fitness of Respondent, Nor the Record Below, Raises the Questions Presented in the Petition, or Any Other Federal Question.

This case presents no federal question that has been finally resolved by the highest court of Illinois, as required by 28 U.S.C. § 1257. Petitioners claim that they have been deprived by the Illinois Supreme Court of an opportunity to be heard regarding an asserted constitutional right to continue a relationship formed over the course of protracted litigation upon a petition to adopt. Yet the critical question addressed by the court below was not, as Petitioners suggest, whether the Does are entitled to continue their custody of Richard, but rather whether Mr. Kirchner, under applicable provisions of state law, is a fit parent. The Illinois Supreme Court's reversal of the finding of unfitness against Mr. Kirchner was a result of its straightforward application of Illinois law. Because it found him fit, that court was compelled by law to vacate the trial court's order of adoption that was premised on this finding. In so ruling, the court below had no cause to consider whether the Does might be entitled to continue some sort of custodial arrangement following the vacation of the order of adoption, and consequently no occasion to reach the issues raised by Petitioners regarding a claim for custody that has never been made in the Illinois courts.

A. The Decision of the Illinois Supreme Court Was Based on its Finding under State Law that Mr. Kirchner is a Fit Parent.

The Illinois Adoption Act ("Act") includes as one of seventeen separate grounds for a finding of unfitness the "failure to demonstrate a reasonable degree of interest, concern or responsibility as to the welfare of a new born child during the first 30 days after its birth." 750 ILCS 50/1(D)(l). Pursuant to this section of the Act, the trial court found that Mr. Kirchner was unfit, terminated his parental rights, and affirmed Richard's adoption by the Does.[2]

After fully reviewing the evidence, all seven Justices of the Illinois Supreme Court concluded that the trial court's finding of unfitness was unsupported by the manifest weight of the evidence. The decision of the court below turned solely on its interpretation of this provision of state law, and on its application of the law to the facts of this case. Its decision falls in an area of familial relationships in which this Court has long shown great deference to state interests. *See Rivera v. Minnich*, 483 U.S. 574, 582 (1987), *citing U.S. v. Yazell*, 382 U.S. 341, 352 (1966) (O'Connor, J., concurring) ("Both the theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements."); *Lehman v. Lycoming County Children's Servs. Agency*, 458 U.S. 502, 512 (1982) (same);

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[2] The trial court's decision turned not on any finding that Mr. Kirchner's description of his efforts to locate his son was incredible, but rather on its view under law that these efforts were insufficient to establish his fitness. App. 23-24 (app. maj.).

Ex Parte Burrus, 136 U.S. 586, 593 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the states, and not to the laws of the United States.").

In applying section 50/1(D)(l), the court relied on the similarly-worded section of the Act applicable generally to children other than newborns, which provides that a finding of unfitness may be entered against a parent who "fails to maintain a reasonable degree of interest, concern, or responsibility" over a twelve month period. 750 ILCS 50/1(D)(b) (emphasis added). App. 6-7 (sup. conc.). Consistent with its prior interpretation of section (D)(b), the court below concluded that the proper interpretation of section (D)(l) requires a subjective focus on the intent of the parent, rather than an objective focus on whether the parent's efforts to establish a relationship with the child meet with success. App. 2 (sup. maj.), App. 13-15 (sup. conc.). This focus must account for any obstacles faced by the parent in seeking to establish a relationship – obstacles that in this case included the provision to Mr. Kirchner of false information about the claimed death of his son and the collective failure of the Does, their lawyer, and Richard's mother to inform Mr. Kirchner of Richard's placement with the Does or to provide him with timely notice of adoption proceedings. The Illinois Supreme Court unanimously concluded that the trial court erroneously dismissed these obstacles as irrelevant and that under the proper interpretation of the Illinois Adoption Act, the manifest weight of the evidence did not support the trial court's finding of unfitness. App. 2 (sup. maj.), App. 13-15 (sup. conc.).

This finding, as a matter of state law, compelled reversal of the orders terminating Mr. Kirchner's parental rights and allowing Richard's adoption, orders that were necessarily dependent on the finding of unfitness. The Act, as interpreted by the Illinois Supreme Court in the leading case of *In re Adoption of Syck*, 138 Ill.2d 255, 562 N.E.2d 174 (1990)), defines the parameters of a process for freeing children for adoption that must begin with a parent-focused inquiry into the issue of fitness, and that looks only to the question of whether adoption is in a child's best interests after the parent is found unfit. Under the Act, a parent who refuses to consent to adoption must be found unfit before an adoption may go forward. 750 ILCS 50/8(a)(1). The issues relevant to each of these two components of the termination and adoption process are distinct and may not be confused. *Syck*, 138 Ill. 2d at 276-77, 562 N.E. 2d at 183-84 (" '[W]here the rights and interests of a parent are sought to be permanently severed, the best interests of the child can be considered only if the court finds by clear and convincing evidence that the parent is unfit or consents to the severance.' Only evidence that bears on the issue of unfitness is to be considered, precluding evidence bearing on whether adoption is in the child's 'best interests'."). (citation omitted).

Under state law, neither an order terminating a parent's rights nor an order of adoption can be sustained in the absence of a finding of unfitness against a non-consenting parent, and the power of a court to sanction an adoption is wholly dependent upon the entry of a finding of unfitness against a non-consenting parent. In the instant case, the Illinois Supreme Court's vacation of the order of adoption was a function of nothing more than its conclusion that Mr. Kirchner was improperly found to be unfit, and its application of well-settled principles of state law requiring that a

finding of unfitness against a non-consenting parent is a prerequisite to an order of adoption.

B. The Question of Whether the Does Are Entitled to a Hearing to Determine Whether They May Continue Their Custodial Status Has Never Been Raised Below, Was Not Addressed by the Illinois Supreme Court, and Is Not Fairly Presented by this Case.

Petitioners do not directly challenge either the Illinois Supreme Court's judgment regarding Mr. Kirchner's fitness or its vacation of the adoption order. Rather, they ask this Court to determine whether or not a hearing must be held, prior to any change in custody, "to determine whether it is in [Richard's] best interests to be placed in the custody of his biological father, whom he has never met." Petition, p. i (Questions Presented for Review).[3] The Illinois Supreme Court, however, ruled

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[3] Petitioners' somewhat confusing second ground for seeking certiorari actually adds little of consequence to their first argument. Though Petitioners' include an extensive discussion of the facts of the case (Petition, pp. 24-30), they expressly disavow any claim that they are seeking review of factual issues (*id.*, pp. 6-7). Since they do not seek review of the factual determination that Mr. Kirchner is fit under Illinois law (a judgment that in itself is clearly inappropriate for review), their second argument may be reduced to the question of whether public policy respecting a child's best interests may compel the recognition of a right to continue their custodial relationship, in the absence of a proper finding of unfitness against Mr. Kirchner. To the extent that they are asking for legal custody, the Petition raises no questions fit for review for the reasons described in this section. To the extent that they may be claiming a right to continue their status as adoptive parents, as discussed in both

only that the trial court's finding of unfitness and the orders dependent on that finding must be reversed. No aspect of that court's ruling addressed the question of whether a custody hearing should occur in the wake of its decision, and the issue of Richard's custody has never been presented to the Illinois courts. To be sure, the issue of Richard's custody may yet be raised in subsequent litigation, presumably upon the filing by the Does of a petition for a custody hearing; nothing in the decision of the Illinois Supreme Court or in Illinois law precludes the Does from seeking such a hearing, under a best interests standard, upon the filing of an appropriate petition meeting the requirements of the Illinois Marriage and Dissolution of Marriage Act, 750 ILCS 5/601(b) (commencement of custody proceeding). To date however, no such request for custody has ever been made. Where a petitioner has failed to provide the state courts with an opportunity to consider the question presented, or where significant issues that may have a substantial impact on a petitioner's claims have yet to be litigated, this Court lacks jurisdiction to hear a case under 28 U.S.C.A. § 1257. *See, e.g., Minnick v. California Department of Corrections*, 452 U.S. 105 (1981); *Flynt v. Ohio*, 451 U.S. 619 (1981); *Costarelli v. Massachusetts*, 421 U.S. 193 (1975).

The proceedings in this case were initiated with a petition filed by the Does seeking to adopt Richard. Under Illinois law, different provisions of law, with different applicable standards and consequences, apply to

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Section I(A) and Section II, their claim is utterly without support in law and therefore also not worthy of review by this Court.

custody proceedings, which are fundamentally distinct from proceedings relating to adoption. *See In re Abdullah*, 85 Ill.2d 300, 305-06, 423 N.E.2d 915, 917-18 (1981) (contrasting standards and processes applicable to the termination of parental rights and adoption with custody proceedings under the Illinois Marriage and Dissolution of Marriage Act); *In the Interest of Jones*, 34 Ill. App. 3d 603, 340 N.E.2d 269, 273 (1st Dist. 1975) (same).

Because the Does have never sought custody of Richard in the Illinois courts, the Illinois Supreme Court declined to address the issue of custody as not properly before it. App. 12 (sup. conc.). The Illinois courts have never addressed at any level critical legal questions, including whether or not the Does would have standing to file an action for custody under section 5/601(b) of the Illinois Marriage and Dissolution of Marriage Act, 750 ILCS 5/601(b), or whether legislation hastily passed in the wake of the Illinois Supreme Court decision (Ill. P.A. 88-550, enacted and effective July 3, 1994), purporting to mandate a hearing on custody whenever an adoption is vacated, may be applied retroactively to Richard's case consistent with the Illinois and United States Constitutions. The parties have never conducted discovery as to what might now be in Richard's "best interests," or presented to the Illinois courts, at any level, evidence relevant to this question, including evidence as to "(1) the wishes of the child; (2) the sufficiency and stability of the homes and surroundings of the parties; (3) the interaction and relationship between the parent and the child; (4) the child's adjustment to his present home; [or] the mental and physical health of the parties' involved." App. 63 (app. dissent). Indeed, the Illinois courts have never been

asked to consider the question posed by Petitioners as to whether some sort of hearing is constitutionally required when an adoption order is vacated on appeal. Until the Illinois courts have had an opportunity to treat custodial issues that will certainly impact on the ultimate resolution of Richard's future, the finality requirement of section 1257 precludes review by this Court.

In sum, the issues of custody raised by Petitioners' claim that they have been deprived of a hearing as to whether they are entitled to preserve some form of continued custodial status following the reversal of their adoption have never been addressed by the Illinois courts. Neither the record nor the decision below presents any federal question decided finally by the highest court of Illinois, and this Court accordingly lacks jurisdiction to grant the Petition for Certiorari.

II. The Decision of the Illinois Supreme Court Is Fully Consistent with the Decisions of this Court Defining Constitutional Protections for Family Relationships.

Even apart from the fact that it raises no federal question proper for review, the Petition for Certiorari should be denied because the decision of the court below is fully consistent with the precedent of this Court and other courts defining the scope of constitutional protections for familial relationships. The decision of the Illinois Supreme Court, applying a well-established framework for terminating parental rights, raises neither a conflict of law nor an important issue of federal law that has not

been but should be settled by this Court. *See* Supreme Court Rule 10.1.

Petitioners claim in essence that the decision of the Illinois Supreme Court was somehow in derogation of their "protectible [sic] liberty interest in maintaining the relationship [Richard] has developed with his adoptive family." Petition, p. 16. Yet regardless of what might be the parameters of this vaguely-defined claim,[4] it remains clear not only that the claim is without support in law, but also that this Court has repeatedly affirmed that the interests of non-family members in relationships with children are subordinate to the constitutionally-protected relationship between a child and a fit parent. In the leading and dispositive case of *Santosky v. Kramer*, 455 U.S. 745 (1982) (a decision which the Petition neglects even to mention), this Court held that a parent must be found unfit by clear and convincing evidence before his parental rights can be permanently severed and a child can be freed for adoption. 455 U.S. at 769. *See also Stanley v. Illinois*, 405 U.S. 645, 658 (1972) ("[A]ll Illinois parents are constitutionally entitled to a hearing on their fitness before their children can be removed from their custody.") Even if a child's interests may arguably lie in

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[4] Petitioners do not even attempt to define what the specific nature of this interest might be; they do not specifically claim a right to any particular status, either as adoptive parents or custodians. Rather, they claim in their questions presented only that they are entitled to a "hearing to determine whether it is in [Richard's] best interests to be placed in the custody of his biological father." Petition, p. i. The vagueness of this proposition renders it difficult indeed to determine where exactly the constitutional parameters of this interest might lie.

remaining in the custody of persons other than their parents, parental rights of a fit, non-consenting person may not be terminated. *See Santosky*, 455 U.S. at 759 ("The factfinding does not purport – and is not intended – to balance the child's interest in a normal family home against the parents' interest in raising the child. Nor does it purport to determine whether the natural parents or the foster parents would provide the better home."); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978), *quoting Smith v. Organization of Foster Families*, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring in judgment) ("We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.' ").

The constitutional principles upon which the Court in *Santosky* relied remain vital, as evidenced by the recent opinions in *Reno v. Flores*, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993), and *DeBoer v. DeBoer*, 114 S.Ct. 1, 125 L.Ed. 2d 755 (1993). In *Reno*, this Court again affirmed that the Constitution protects the relationship between a child and a fit parent, and that the decision to sever this relationship may not stand solely on the conclusion that to do so may be in the "best interests" of the child. 113. S. Ct. at 1448 (" 'The best interests of the child,' . . . is a proper and feasible criterion for making the decision as to which of two parents will be accorded custody. But it is not traditionally the sole criterion – much less the sole constitutional criterion – for other, less narrowly channeled judgments involving children. . . . Even if it were shown,

for example, that a particular couple desirous of adopting a child would best provide for the child's welfare, the child would nonetheless not be removed from the custody of its parents so long as they were providing for the child adequately.") More recently, in *DeBoer*, this Court refused to stay the effect of the decisions of the Iowa and Michigan Supreme courts requiring that the celebrated "Baby Jessica" be allowed to live with her father. In so ruling, this Court, by Justice Stevens, flatly rejected the notion that parents seeking to adopt a child and preserve a custodial relationship established over the lengthy course of litigation can do so absent a proper finding of unfitness against the non-consenting father:

> Neither state law nor federal law authorizes unrelated persons to retain custody of a child whose natural parents have not been found unfit simply because they may be better able to provide for her future and her education. As the Iowa Supreme Court stated: "Courts are not free to take children from parents simply by deciding another home appears more advantageous."

114 S.Ct. at 1-2, 125 L.Ed. 2d at 757 (denying application for a stay of judgment and mandate) (citation omitted).

Here, as was the case in *DeBoer*, review is sought by a couple who have had custody of the child through prolonged litigation, after the highest court of the state has determined that no grounds exist for finding the father unfit and terminating his rights. The only difference between the circumstances of the *DeBoer* case and those of the case at bar lies in the fact that the Does "were able to procure an entirely erroneous ruling from a trial judge

that allowed the adoption to go forward" (App. 67 (Heiple rehearing)) and enabled them to preserve their status as Richard's custodians.[5] However, this fact is of no constitutional significance; what is important is that in the view of all seven Justices of the Illinois Supreme Court, Mr. Kirchner is not an unfit parent, and there consequently is no basis for recognizing the Does' adoption of Richard.[6]

Petitioners' novel assertion of a federally-protected interest in their relationship with each other not only conflicts with the clear precedent of this Court, but is also unsupported by the authority upon which they rely. Petition, p. 18-20, *citing Smith v. Organization of Foster Families*, 431 U.S.

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[5] The Does and their initial counsel in this case share culpability for the situation they have placed this child in, due in part to the filing of affidavits in the trial court misrepresenting that Richard's father was "unknown." *See* App. 46 (app. dissent); Statement of the Case, ¶ 5, *supra*. These misrepresentations engendered a finding of unfitness – fourteen months after the baby's placement with the Does – that the appellate dissent fairly described as a "charade." App. 62 (app. dissent).

[6] Decisions of other state courts have also consistently recognized that parental rights must be properly terminated before a child can be freed for adoption, and that judgments about a child's "best interests" have no place in the consideration of a parent's fitness. *See, e.g., Adoption of Kelsey S.*, 1 Cal. Rptr. 2d 615, 632-33, 823 P.2d 1216, 844-46 (1992); *In the Interest of B.G.C.*, 496 N.W.2d 239, 245 (Iowa 1992); *In re Adoption of S.E.*, 232 Mont. 31, 34-35, 755 P.2d 27, 29 (1988); *In the Matter of the Adoption of Eder*, 312 Or. 244, 260, 821 P.2d 400, 411 (1991); *Hawk v. Hawk*, 855 S.W.2d 573, 580-81 (Tenn. 1993); *Harris v. Hebers*, 838 S.W.2d 938, 942 (Tex. App. 1992), *citing Holley v. Adams*, 544 S.W.2d 367, 370 (Tex. 1976); *In the Matter of the Adoption of R.H.A.*, 702 P.2d 1259, 1264 (Wyo. 1985).

816. In *Smith*, this Court upheld New York's scheme for notifying foster parents of placement changes, declining to recognize greater constitutional rights of foster parents largely because of its understanding that such a step could only come at the expense of the well-established constitutional interests of biological parents and their children in preserving their relationships:

> [O]rdinarily procedural protection may be afforded to a liberty interest of one person without derogating from the substantive liberty of another. Here, however, such a tension is virtually unavoidable. . . . [The parent's] rights are difficult to reconcile with the liberty interest in the foster family relationship claimed by appellees. It is one thing to say that individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered, even in the absence of biological connection or state-law recognition of the relationship. It is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized liberty interest that derives from blood relationship, state-law sanction, and basic human right.

431 U.S. at 846.

The Does inaptly liken themselves to the biological parents whose constitutional rights were affirmed in *Smith*. However, in the absence of a proper finding of unfitness against Mr. Kirchner, their status is functionally equivalent to that of the foster parents whose rights were clearly found subordinate to those of biological parents. Recognition of a fundamental liberty interest between Richard and the Does can only come at the expense of the

constitutionally protected relationship between Mr. Kirchner and his son – a price which this Court's opinions in *Santosky, Smith, Reno,* and *DeBoer* make clear is too high a price to pay.

This Court's opinion in *Stanley v. Illinois*, 405 U.S. 645, upon which Petitioners also rely (Petition. pp. 22-30), similarly offers no basis for concluding that the decision below is at odds with precedent of this Court. Here again, it is difficult to discern from their argument what exactly is being claimed by Petitioners; they appear to suggest that, driven somehow by the decision in *Stanley*, the court below failed to adhere to a strict interpretation of the applicable statutory definition of unfitness that would otherwise have been compelled by state law and public policy. Petition, p. 22.[7] However, nothing in *Stanley* even addresses the specific manner in which states may or may not define unfitness, and nothing in that decision conflicts in any way with the public policy notion that final judgments of adoption, entered upon proper consents or findings of unfitness, should be respected. Indeed, not even Justice Heiple, whose reliance on *Stanley* is challenged by Petitioners, read that decision to conflict with the public policy favoring finality in adoptions.

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[7] Apart from the readily-apparent fact that there is no real conflict between *Stanley* and the decision below, Petitioners mistakenly characterize Justice Heiple's opinion in support of the denial of rehearing (App. p. 68 (Heiple rehearing)) as the opinion of the court (Petition, p. 29). Though the Illinois Supreme Court as a whole denied rehearing by a five-to-two vote, no other Justice joined in Justice Heiple's opinion.

Petitioners also seem to suggest that by binding the Illinois courts "to treat unmarried fathers the same as unmarried mothers and married parents when determing their rights to custody of their children" (Petition, p. 22), *Stanley* somehow conflicts with Illinois public policy. Yet *Stanley* assuredly does not permit – much less encourage – the finalization of an adoption at the consent of an unmarried mother, in the absence of a finding of unfitness against a non-consenting father. Quite the contrary, *Stanley* requires that non-consenting fathers, even if unmarried, must be found unfit before their rights can be terminated – a requirement reflected by Illinois law. *See* 750 ILCS 50/8(a)(1). Subsequent decisions of this Court (*Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Quilloin v. Walcott*, 434 U.S. 246 (1979)) permit states great latitude in defining what fathers must do to establish paternity and how unfitness may be defined, but leave intact the fundamental ruling of *Stanley* that a father must be found unfit before his parental rights may be permanently terminated regardless of his marital status.

The principles underlying each of the decisions of this Court discussed above reflect important procedural protections that guard against undue interference with family relationships, and that inure to the mutual benefit of parents and children alike. *See Santosky*, 455 U.S. at 760 ("[T]he State cannot presume that a child and his parents are adversaries . . . [U]ntil the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.") The position advocated by Petitioners would not only erode the important safeguards embodied in the

termination process, but also establish dangerous incentives for unscrupulous adoptive parents and attorneys to delay final resolution of disputes through dilatory tactics, in the hope that the passage of time will cure obvious defects in the termination process – including defects of a constitutional dimension – and permit would-be adoptive parents to solidify otherwise dubious claims to the custody of children born to fit parents. *Cf. DeBoer v. DeBoer*, 114 S.Ct. 1.[8] The interests of children generally cannot possibly be served by a rule that not only permits, but indeed encourages lengthy delays in the resolution of proceedings to determine their future.

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[8] Respondent has been informed that attorneys who represented the DeBoers in Michigan court proceedings intend to file a brief *amicus curiae* in support of the Petition for Certiorari. Respondent notes that arguments presented in support of their own request for a stay of the judgment of the Michigan and Iowa Supreme Courts in the "Baby Jessica" case – a case strikingly similar to this case – have already been rejected by this Court. 114. S. Ct. 1. No more justification exists for reviewing this case than existed in *DeBoer*.

Respondent has also been informed that the Governor of Illinois intends to file a brief *amicus curiae* in support of the Petition. In a proposed brief in support of rehearing which he moved to file in the court below, the Governor sought (and was refused) permission to inject his personal view of the facts of the case and the proper application of the Illinois Adoption Act into the Illinois Supreme Court's deliberations. Apart from the dubious merits of his arguments below, his only tenuous interest in the case lies in the application of Illinois law by the Illinois courts – an interest that adds nothing to the merits of Petitioners' unavailing efforts to construct federal claims worthy of review by this Court.

Mr. Kirchner recognizes, as Petitioners assert (Petition, p. 23-25), that constitutional protection of the parent-child relationship depends on more than biology. However, this Court has never held that a parent may constitutionally be deprived of even the *opportunity* to prove himself fit. *Compare Michael H. v. Gerald D.*, 491 U.S. 110; *Quilloin v. Walcott*, 434 U.S. 246; *Lehr v. Robertson*, 463 U.S. 248 (1983) (all upholding the termination of parental rights of fathers who had each been given ample opportunity to care for their children, but had failed to do so). Mr. Kirchner has never acted in a manner suggesting a lack of interest in his son. He supported Ms. Janikova throughout her pregnancy and has sought to assert his right to parent his child from the earliest opportunity, though he has never been given the chance to do so. The Illinois Supreme Court's conclusion that he must be recognized as Richard's father is fully consistent with the decisions of this Court and should not be disturbed on review.

CONCLUSION

For the foregoing reasons, Respondent Otakar Kirchner respectfully requests that this Court deny the Petition for Certiorari.

Respectfully submitted,

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